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APR 4 1906
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 539.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Supplemental Brief on Question of Constitutionality of Section 1782, Revised Statutes.

A.

If, as we maintain, the power to discipline a Senator for misconduct as a Senator, in which misconduct a necessary element is that he is a Senator, rests exclusively with the Senate itself under the provisions of the Constitution, then the entire section 1782 is invalid as to Senators (and Representatives also), and no question arises of separability of the invalid clause of section 1782 that undertakes to incapacitate any person (Senator included) from holding office after conviction.

B.

But even if (as we deny) such official misconduct of a Senator may be made an offense by act of Congress and made triable and punishable by the courts, then the invalid clause, which undertakes to incapacitate a Senator from holding office after conviction, is not separable, and the entire section 1782 is equally invalid as to Senators.

A Senator is an officer under the Government of the United States.

Abolish the "Government of the United States," then the Senate is abolished, and the office of Senator. The Government of the United States consists of Legislative, Executive, and Judicial Departments. The Senate is part of the Government, created by the Constitution, and a Senator is an officer under such Government.

Consider the *mischief* aimed at in section 1782, namely, a Senator or Representative abusing his high office, and the *remedy* provided in section 1782 is that he is removed from office. A reading of the statute, section 1782, leads inevitably to this conclusion.

We are not concerned with any abstract question as to what is an *"officer of the United States;"* but what does this particular statute mean? This reads: That any Senator who while *"in office"* does certain things shall be incapacitated from holding *any* "office."

The suggestion of the prosecution is that this means not the office which he has abused, but some other office, and that the Senator keeps right on in the office which he has abused.

Mr. Justice Brown suggested whether part of section 1782 as to being incapacitated, by conviction, from holding office could be held invalid and the rest of the statute stand.

Is that part of the statute separable? Test this question. The well-established rule is that it must be *clear* that the legislative body would have enacted the statute with the invalid part left out.

The mischief aimed at by statute was abuse by Senators and Representatives of their high office—misconduct while in office. The suggestion that this invalid clause is separable is that the legislative body would have passed this act, though it left the Senator who had abused his office still in office, instead of removing him from it as a punishment for his misconduct; also that the legislative body would have enacted that the Senator might be imprisoned for two years, and thus be kept out of the Senate, and yet no vacancy created which might be filled, and then he be received back into the Senate when his term of imprisonment ended, and then go on with senatorial duties as though he had not abused his high office.

In order to hold the invalid clause separable this court must say not merely that the legislative body *might* have enacted such an improbable and absurd statute, but that *it is clear* that the legislative body would have enacted it.

The suggestion has been made also that the Senate might try a Senator after the courts had finished their trial.

Try him when?

(1.) While he is in prison and in his absence and without giving him an opportunity to be heard?

(2.) Or bring him out of prison to be tried?

(3.) Or try him at the end of the imprisonment—after his seat has remained unoccupied two years or four years or more, as the case may be?

Is it CLEAR that Congress would have enacted such an absurd statute?

On the contrary, it is clear that Congress would not.

The invalid clause is not separable.

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